No. 15677

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation,

Appellee.

Appeal from the United States District Court
for the District of Oregon.

APPELLANT'S BRIEF

EUGENE A. RERAT
Attorney for Appellant
610 Baker Building
Minneapolis, Minnesota

Of Counsel:
HARRY H. PETERSON
505 Minnesota Federal Bldg.
Minneapolis, Minnesota

OWEN A. JOHNSON
1201 Dexter Horton Bldg.
Seattle, Washington

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SUBJECT INDEX

AUTHORITIES CITED

Statutes:

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STATEMENT OF THE CASE

The Pleadings.

The Complaint alleges that the Court below had jurisdiction of the action as one brought under the Federal Employers' Liability Act, *U.S.C.A.*, Title 45, Sections 51-60; that on February 6, 1955, plaintiff was employed by the defendant as a "pilot herder" in the Terminal operated by it in the City of Portland, Oregon (R. 4, par. V); that while plaintiff was in the performance of his duties as such "pilot herder," he was riding in the trail unit of two diesel engines coupled together back-to-back; that, while plaintiff was so riding in the rear diesel unit, the defendant, by its agents,

servants and employees, caused the double diesel unit to reverse its course and to be operated carelessly and negligently so as to collide with a cut of cars which were in the process of being switched from an adjacent track onto the track on which the diesel unit was situated; that the operation of the diesel unit in reverse was under the circumstances negligent in that it was done at a high and dangerous speed and in violation of the rules of the company, without having the diesel units under control, without keeping a proper lookout, and disregard of the safety of the plaintiff and others, that thereby the defendant failed to provide plaintiff with a reasonably safe place to work and that thereby the defendant negligently failed to adopt a reasonably safe plan and method for performing said work (R. 56, par. V).

The Complaint further alleges that as the direct and proximate cause of such negligence plaintiff was severely injured (R. 6-7, pars. VI, VII, VIII).

The Answer alleged that the Complaint failed to state a claim upon which relief could be granted; contained a general denial of the allegations of the Complaint, admitted that plaintiff was employed as a "pilot herder"; and that plaintiff was guilty of contributory negligence which was the sole, proximate, contributing and concurring cause of his injury.

JURISDICTION OF DISTRICT COURT

The District Court for the District of Oregon, the court below, had jurisdiction of this action under and by virtue of the provisions of *U.S.C.A.*, Title 45, Section 56, which, so far as here pertinent, provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under

> this chapter shall be concurrent with that of the courts of the several States."

Portland, Oregon, is the residence of the defendant and the place wherein the cause of action arose. It is also the place where the defendant was doing business at the commencement of the action.

JURISDICTION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT TO REVIEW THE JUDGMENT

This Court has jurisdiction to review the judgment below under and by virtue of the provisions of *U.S.C.A.*, Title 28, Section 1291, as amended October 31, 1951, and which, so far as here material, reads:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. * * *"

The judgment below is a final decision.

JURISDICTIONAL AVERMENTS

The Complaint alleges that the action is one brought under the Federal Employers' Liability Act, *U.S.C.A.*, Title 41, Sections 51-60 (R. 3, par. I); that the defendant is a railroad corporation incorporated under the laws of the State of Oregon and operating a freight and passenger business within that state (R. 3, par. II); and that the plaintiff sustained his injuries as a result of the defendant's negligence while so employed by it in the City of Portland, Oregon, which is within the territorial jurisdiction of the court below (R. 4-5, par. IV); these jurisdictional averments are, in effect, admitted by the answer (R. 8-9).

STATEMENT OF FACTS

Plaintiff, Frank Reiner, was employed by the defendant in the Northern Pacific Terminal Depot as a "pilot herder" switchman (R. 31-33). He was injured in an accident on February 6, 1955, at about 9:15 p. m., in a collision which occurred between the two-diesel unit and a freight train at a place between the Terminal Depot and the Guild Lake Yards. The Guild Lake Yards are about two miles from the depot (R. 34).

Reiner had been employed by the defendant for about 35 years prior to the accident (R. 31). He reported for work on February 6, 1955, at about 3:30 p. m. (R. 32). His working hours were from 3:30 p. m. until about 11:30 p. m. (R. 32). He reported for duty at his regular place in the depot (R. 32).

The duties of a "pilot herder" are defined by provisions in the union agreement between the defendant and the union, which was marked Plaintiff's Exhibit 13, and which was received in evidence at page 99 of the Record (R. 39). The provisions thereof, so far as herein pertinent, were read into the record at pages 100-101, and are as follows:

> "It is the Company's position that a Pilot's duties also properly include the following:
>
> "1. The coupling and/or the uncoupling of cars on passenger trains at the crossings in depot passenger train yard.
>
> "2. The coupling and/or uncoupling of road engines of passenger trains in the depot passenger yard (81).
>
> "It is also the Company's position that giving the necessary signals for passenger trains to proceed when they are to leave the depot passenger yard when loading of passengers, mail, express, etc., has been completed and likewise governing the movement of passenger trains within the depot yard tracks to discharge the aforementioned traffic and to pull over passenger, foot, or truck crossings is Stationmaster's work."

The qualifications of a "pilot herder" are that he must be a qualified engine fireman (R. 102); that it is the duty of a "pilot herder" "to uncouple the cars, the passenger train cars, at the height shed and couple them if necessary, to uncouple the road engines from the trains and to couple them to the trains" (R. 103). The "pilot herder" travels with the engine from the Terminal to Guild Lake Yards in some cases (R. 103). The "pilot herder" has nothing whatever to do with the operation of the engine (R. 103). He has nothing to do with putting on the headlight, either dim or bright (R. 103). He has nothing to do with the operation of the windshield (R. 103-104). There is a fireman and an engineer in the front cab when the engine is being operated (R. 104). The "pilot herder" has nothing to do with keeping a lookout on the track for obstructions, but is required to be alert at all times (R. 104). The "pilot herder" has no duties to perform so far as keeping a lookout to the rear or to the front for obstructions when the movement of the train is made on a mainline track with a double diesel unit and the unit makes a stop (R. 104). And he has nothing to do with any mechanism of the diesel or locomotive (R. 104).

The witness Leap made the statement in his testimony that a "pilot herder" switchman "pilots the engine" and that the one who pilots the engine is under the duty to take a safe course (R. 106). The duties of a "pilot" as distinguished from a "pilot herder" are defined by Rule 108, which is referred to in the Record at page 106. Rule 108 is contained in the rules adopted by the company, which were received as Exhibit 21 in the Record at page 107.

A "pilot" as distinguished from a "pilot herder" does have a duty of maintaining a lookout. This is covered by Rule 106 which is part of the defendant's rules and reads as follows (R. 107) (italics supplied):

> "The *conductor* and the *engineer* and *pilot,* when there is one, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules must take every precaution for protection."

The witness Curtis gave testimony to the effect that the duties of a "pilot herder" are substantially as stated above with the exception that if the "pilot herder" was in a position to see ahead it was his duty to keep a lookout (R. 136-139).

In order to clarify the testimony as to exactly what the respective duties of a "pilot herder" and a "pilot" are, the witness Leap was re-called. After reiterating his testimony in chief, he testified further, that in a situation such as was shown by the evidence, where a diesel unit stops and intends to make a reverse movement, it would be the duty of the pilot herder to get off the diesel, go back along the track to protect the movement and do whatever was necessary there under the circumstances (R. 147-148).

On cross examination he testified that if the pilot herder knew that the reverse movement was to be made, he would be under the obligation to protect the backup movement (R. 149).

The defendant's witness Moore testified on direct examination that plaintiff, as the "herder," was responsible for maintaining a lookout in connection with the backward movement (R. 151); that he, Moore, turned on the light on the diesel "dim," because plaintiff told him to do so (R. 152).

On cross examination Moore testified that both the engineer and the fireman were under the duty of keeping a proper lookout in connection with the backward movement (R. 154-156); and then Rule 22 was read into the record and is as follows:

> "Rule 22: Firemen are subordinate to engineers. Engineers must see that firemen are familiar with and perform their duties, instruct them if necessary, and see that they are conversant with and properly understand and comply with the rules and special instructions, particularly those relating to the operation of trains. Disobedience and incompetency must be reported. The engineer or the fireman must not move the train or any part of its machinery unless he knows that it can be done without injury to anyone. The engineer or fireman must not go underneath the engine without notifying the other. * * *"

He further testified that the plaintiff was in the rear of the cab and not in the front and that he, Moore, was in the engineer's seat and a fireman by the name of Brady was in the fireman's seat when the backward movement was undertaken and during all the time it was in progress (R. 157-161).

Moore further testified that Reiner was sitting in the engineer's seat (R. 167); that he considered it his duty to "look out to see if everything was clear" before the movement went back (R. 163).

The accident occurred on the return trip at a place referred to in the Record as about one-half a mile from the depot or about 500 feet north of 17th Street. The *locus en quo* is illustrated by a sketch which we have made to illustrate the testimony but it was not introduced in evidence. We think it is sufficiently accurate to portray the situation. (See following page.)

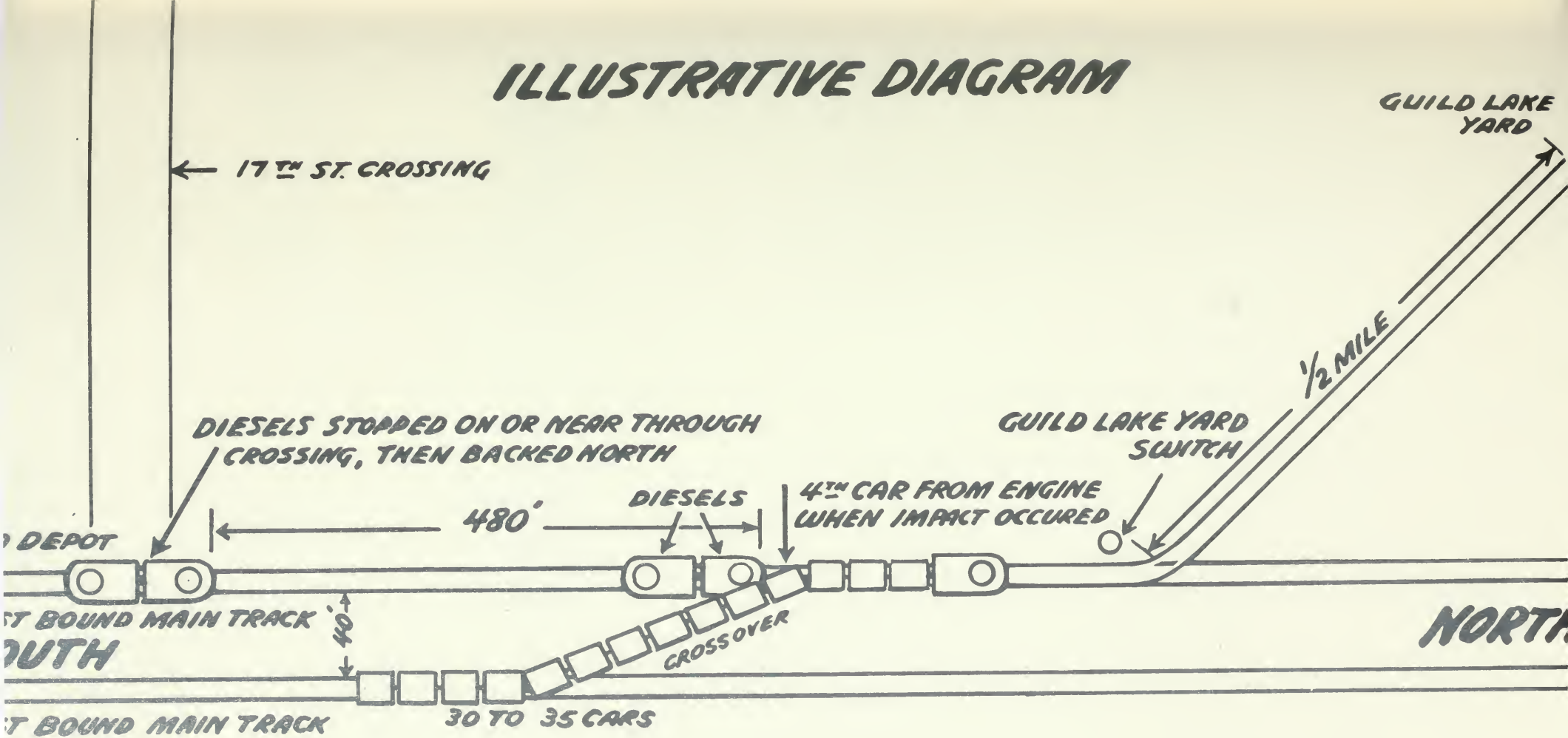
The two-diesel engine unit had hauled a train into the depot where plaintiff disconnected the diesels from the train for the purpose of having the diesels taken to the Guild Lake Yards for the purposes of servicing the diesels. The trip to the yards was uneventful. The diesels were in charge of the hostler regular engineer, one Meyers, and the regular fireman hostler helper, one Moore (R. 34).

On the return trip, the diesels were attached to each other, end to end, with a cab at each end of the units. The engineer and the fireman sat in the cab at the front of the joined units (R. 34). Plaintiff and the boilermaker, by the name of Bray, sat in the cab in the rear engine, Bray occupying the fireman's seat and plaintiff, the engineer's seat. The two-diesel unit proceeded from the Guild Lake Yards to the main westbound track (R. 36). Then it proceeded on the main westbound track until the accident occurred. While the two tracks are referred to as the "eastbound main line and the westbound main line," the tracks, as a matter of fact, ran in a general northerly and southerly direction. They were separated from each other by a space of about 40 feet. The track on the east side was known as the "eastbound main line" and the one on the west side known as the "westbound main line." There is a set of tracks connecting the westbound main line with the eastbound main line which is known as a "crossover" track (R. 37). The record is not explicit as to how far the crossover track lies from the depot or the Guild Lake Yards, but plaintiff's testimony shows that it was approximately 500 feet north of 17th Street.

The weather conditions were that it was a dark, rainy, drizzly night. There was need for the use of windshield wipers to keep the windshields in such shape that the engineer and fireman could see through them. It was also necessary to have the lights on for purposes of visibility.

When the two-diesel unit got near 17th Street, the engineer, Mayers, stopped the forward movement. After this had been done, Moore, the fireman or hostler helper, came to the cab of the rear unit where he told plaintiff, "get off the seat, Frank," which plaintiff did. Then plaintiff inquired of Moore, "What is the matter now?" Moore replied, "There is something that we want to try out and we might have to go to the Lake yards" (R. 38). Plaintiff stood a little

ILLUSTRATIVE DIAGRAM



EAST

to the rear of the engineer's seat and the fireman's seat, apparently in the center of the engine. Plaintiff used the phone in the cab for the purpose of talking to the engineer who was in the cab of the other unit. Moore gave a buzz signal three times which indicated a back-up movement (R. 38). This meant that the two-diesel unit, which had been proceeding toward the terminal depot, was to be backed up to the Guild Lake Yards from which they had just come.

At the time the two-diesel unit had come to a stop at 17th Street, a train, consisting of a locomotive and some freight cars, was seen on the adjoining track. This train then proceeded to the crossover track where it crossed over onto the track on which the two-diesel unit was located. The backward movement of the two-diesel unit was started while the crossover movement of the other train was in progress and when it was partly on the same track that the two-diesel unit was; the backward movement of the two-diesel unit was started with a sudden jerk which knocked plaintiff off balance in the center of the northerly most engine. According to plaintiff, the full power of the diesels was applied in making the backward movement. Plaintiff started to call out, "hold it," but, before he could do so, the two-diesel unit ran into the side of the freight train which was making the crossover movement. A power pole had been knocked down as a consequence of the collision (R. 38). A fire was started with a great deal of light. At this juncture the plaintiff jumped from the cab in order to reach a place of safety (R. 43).

The backward movement of the two-diesel unit was about 480 to 500 feet before the collision with the crossover train occurred.

A few days before the accident, defendant had issued a bulletin, known as "Bulletin 69," which prohibited power

test movements on a main track such as the one on which the two-diesel unit was then being operated (R. 61, 45).

The defendant also had a rule established by custom and practice which was to the effect that no back-up movement on the main track should be made without getting a train order authorizing the movement. The rule also specified precisely how the backward movement was to be made and is shown by plaintiff's testimony at pages 40 and 41 of the Record as follows:

> "Q. Now, under those conditions, Mr. Reiner, is such a movement a safe movement?
>
> A. No, because it was making a movement against the current of traffic which is not practicable or practical or is never made.
>
> Q. If you were informed by either Mr. Moore or by Mr. Meyers, the engineer, that they wanted to make a back-up movement like what was made at that time, what was the custom and practice to be followed by you or any other pilot herder?
>
> A. Well, the only way it could be made on a main line would have to be to have a train order and go back and flag, send a man back on the main line to protect against other trains which would be coming and might be coming at any time, which they was there all the time, keep coming from the other way. You have to have somebody there to flag, to flag the movement.
>
> Q. Would you have to have permission from anybody to make such a movement?
>
> A. Yes, you would have to have permission from either the Yardmaster, which would be in our case, there is no trainmaster there, or the operator have a train order or something. He should have something.
>
> Q. How would that have been done by you?
>
> A. I would not have made that move under no conditions that way. If they had wanted to have gone back, I would cross over onto the other eastern main line, and we would have went back (12) that way, which was the proper way to have went." (R. 40-41.)

As the foregoing excerpt shows, no such train order was given and no compliance with the terms of the rules was even attempted before the backward movement was made. In his closing argument, counsel for the defendant in effect admitted that the backward movement was wrongful but he blamed plaintiff for it. So far as his admission that the backward movement was wrongful is concerned, it reads as follows:

> "What is involved in this case? It involves a case where one train's rearend backs and runs into another train. Somebody certainly was off base. Somebody certainly made a mistake here." (R. 214.)

During the trial, defendant was permitted to elicit from plaintiff, over plaintiff's objection, that plaintiff had retired on a pension. The testimony relative to this matter is (R. 68-69):

> "Q. Mr. Reiner, you have retired at the present time, haven't you?
>
> Mr. Rerat: That's objected to as incompetent and immaterial.
>
> Mr. Gearin: You have retired on a company retirement—
>
> Mr. Rerat: That's objected to as immaterial, incompetent, and irrelevant—just a minute, please, I have an objection—
>
> Mr. Gearin: I will tie it up, your Honor.
>
> Mr. Rerat: Your Honor, I would like to finish.
>
> The Court: Is it offered on the issue of damages?
>
> Mr. Gearin: Well, it has to do with some other part about which I may impeach the witness, your Honor.
>
> The Court: Well, if it's offered for impeachment purposes, that's all right, but not if it's offered on the issue of damages.
>
> Mr. Gearin: I am not offering it on that issue of damages at all, your Honor.
>
> The Court: Well, the jury will understand that whether a man is retired on a pension or not has nothing

> to do with whether or not he is entitled to recover in a suit such as (44) this. In any event, if you find that he is entitled to recover, this has nothing to do with the amount he is entitled to recover.
>
> Mr. Gearin: I offer it for a limited purpose, your Honor."

Thus, it appears that the evidence as to the plaintiff's retirement pension was received, not as a defense, but, rather, for purposes of impeachment. A motion to strike the testimony relative to the pension was denied (R. 10). The trial court instructed the jury that it might consider the fact that the plaintiff had a pension in determining whether the plaintiff would have continued to work in the future and, hence, whether the plaintiff had sustained loss of further earnings. The instructions are as follows (R. 274):

> "You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find (62) him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have gone on working had he not been injured, and, hence, is relevant to the issue of whether or not he has lost any future earnings."

Thus, it appears that the evidence as to the pension was not used for the purpose of impeaching the plaintiff but rather for the purpose of showing that, in all likelihood, plaintiff did not sustain a loss of future earnings, which was the basis of his claim. The trial court, in its instructions, stated to the jury the plaintiff was seeking compensation for "loss of earning power" and, if entitled to recover, was entitled to damages sustained by reason of such loss (R. 274).

Counsel for the defendant, in his closing argument, did not make one comment to the effect that the evidence relative to the pension in any way *impeached* plaintiff but rather contended that on the merits plaintiff should not recover because he had a pension. The very last words which counsel uttered in his closing argument were (R. 215):

> "I have perhaps talked too long. I have tried not to. You have been on juries for a long period of times. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people (160) who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think, in fairness, that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you."

SPECIFICATION OF ERRORS

1. The Verdict is contrary to law and the evidence.

2. The Judgment is contrary to the law and the evidence.

3. The Court erred in denying plaintiff's Motion for a new trial.

4. The Court erred in failing to instruct the jury that the defendant was liable as a matter of law.

5. The Court erred in failing to instruct the jury that any contributory negligence on the part of the plaintiff should be considered only in litigation of damages rather than complete and total defense.

6. The Court erred in receiving evidence over plaintiff's objections that the plaintiff had and was receiving a retirement pension.

7. The Court erred in instructing the jury:

"You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find (62) him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have gone on working had he not been injured, and, hence, is relevant to the issue of whether or not he has lost any future earnings."

8. The Court erred in failing to instruct the jury to entirely disregard the following portion of the closing argument of defendant's counsel (R. 215):

"I have perhaps talked too long. I have tried not to. You have been on juries for a long period of time. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people (160) who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think, in fairness, that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you."

9. The Court erred in failing to instruct the jury to entirely disregard the statement in the closing argument as follows (205-206): "I can understand why they brought Mr. Rerat back here from Minneapolis because he certainly makes a beautiful argument to you people" as being an appeal to local passion and prejudice.

10. That the Court erred in denying plaintiff's objections to the following portion of the closing argument of the de-

fendant's counsel and the plaintiff's request that the jury be instructed to disregard (R. 212):

> "Is there some reason why we have had one, two lawyers from Minneapolis, one from Seattle, one from Portland, trying this case for the plaintiff with large photographs, aerial views, blown-up things like those claims in a complaint for considerable sums of money, for doctor and hospital bills when there is no justification or reason for it?
>
> Mr. Rerat: Just a minute, Counsel. I want to object to such testimony on the grounds it is prejudicial, your Honor, and ask that the jury be instructed to disregard it.
>
> The Court: Proceed (157)."

as an appeal to local passion and prejudice and as permitting defendant's counsel to comment on the attorneys who were not actually participating in the trial.

11. The Court erred in failing to instruct the jury that there was a difference between a "pilot-herder" and a "pilot" and as to the respective responsibilities of a "pilot-herder" and a "pilot," as was shown by the Record.

12. The Court erred in denying plaintiff a new trial, for which plaintiff moved, upon the grounds that defendant was guilty of misconduct by bringing before the jury the question, the fact that the defendant had instituted an investigation of the accident in question in which plaintiff was charged at being at fault and in which he was disciplined (73-74).

13. That the Court erred in denying plaintiff a new trial upon the grounds that the plaintiff had been deprived of a fair and impartial trial by reason of the cumulative effect of all the errors hereinbefore assigned.

AUTHORITIES DEEMED TO BE APPOSITE OR CONTROLLING

Point 1. Defendant Was Negligent.

Atlantic Coast Line R. Co. v. Johnson, (C.A. Ga. 1952), 199 F.2d 750, rehearing denied 200 F.2d 619.

Frabutt v. New York, C. & St. L. R. Co. (D.C. Pa. 1950), 88 F. Supp. 821.

Point 2. Plaintiff Was Not Guilty of Contributory Negligence.

Chesapeake & O. Ry. Co. v. Richardson (6 Cir.), 116 F.2d 860, cert. den. 313 U.S. 574.

Point 3. Trial Court Erred in Admitting Evidence as to Plaintiff's Retirement Pension.

Sinovich v. Erie R. R. Co. (3 Cir.), 230 F.2d 658.

Ring v. Mpls. St. Ry. Co., 176 Minn. 377, 223 N.W. 619.

Wise v. C. B. & Q. R. Co. Relief Dept., 133 Minn. 434.

El Paso El. Ry. Co. v. Murphy (Tex. Civ. App.), 109 S.W. Rep. 489.

Chic. G. W. Ry. Co. v. Peeler (8 Cir.), 140 F.2d 865.

45 *U.S.C.A.,* Sections 55, 58, 228a.

Point 4. Error to Receive Evidence of Retirement Pension for Impeachment and Then Using It Generally.

88 *C.J.S.,* Sec. 87, p. 195.

Point 5. Appeals by Defendant to Local Prejudice.

Anno.: 78 *A.L.R.* 1456.

ARGUMENT

SUMMARY OF ARGUMENT

Plaintiff contends that defendant's negligence appears as a matter of law for the reason that it appears without any dispute that the engineer made a power test on the mainline in violation of the rule promulgated by the defendant in Bulletin 49 about a week before the accident and in addition thereto violated the rule relative to not making any backup movements at the place of the accident without a yard order, and, finally, in making the backward movement without maintaining a lookout to avoid collision with a train which was making the cutover, and which was plainly visible to anyone who would have looked.

Plaintiff contends that he was not guilty of contributory negligence for the reason that he was under no duty to do anything at the time the accident occurred and, finally, was not guilty of any breach of duty so as to be guilty of contributory negligence.

Plaintiff contends that the Court erred in receiving evidence as to plaintiff's retirement pension for two reasons, viz.: 1. The matter of the pension was entirely irrelevant and immaterial to any issue before the Court; and, 2. The showing of the retirement pension enabled the defendant to escape liability in violation of *U.S.C.A.*, Title 45, Section 55.

Plaintiff further contends that he was deprived of a fair and impartial trial by reason of the conduct of counsel for the defendant who used the evidence relative to the pension, which was received for the sole purpose of "impeaching" the plaintiff, to argue that the defendant was not liable at all and by his appeals to local passion and prejudice by calling the jury's attention that one of plaintiff's counsel was from Minneapolis; by placing before the jury that plaintiff had

been subject to an investigation and trial and discipline as a consequence of the accident, and by utterly confusing the evidence relative to the distinction between a "pilot herder" and a "pilot."

I.

DEFENDANT IS LIABLE, AS A MATTER OF LAW, FOR NEGLIGENCE

U.S.C.A., Title 45, Section 51, provides that a railroad engaged in interstate commerce shall be liable for injuries to its employees, "resulting in whole or *in part* from the negligence of the officers, agents or employees of such carrier." A railroad company is guilty of negligence if it violates its working rules and is liable to its employees for any injury sustained as a direct and proximate consequence thereof.

Atlantic Coast Line R. Co. v. Johnson (C.A. Ga. 1952), 199 F.2d 750, rehearing denied 200 F.2d 619.

Frabutt v. New York, C. & St. L. R. Co. (D.C. Pa. 1950), 88 F. Supp. 821.

Myers v. Southern Pac. Co. (1936), 58 P.2d 387, 14 Cal. App.2d 287, rehearing denied 59 P.2d 1001, 14 Cal. App.2d 287.

McCrowell v. Southern Ry. Co. (1942), 20 S.E.2d 352, 221 N.C. 366.

As held in *Topore v. Boston, Maine R. R.*, 78 N.H. 536, 537, 103 Atl. 72, 73, the adoption of such rules "admits the reasonable necessity for the conduct thereby prescribed."

While Moore testified that the backward movement was not a power test, the testimony as to what actually happened shows the movement was a power test and nothing else.

There is no dispute at all as to the fact that a train order was required to authorize such a movement and that such a train order had never been obtained. The purpose of the

train order was to prescribe a course of conduct which would make the backward movement a safe one. If such an order had been obtained, it would have been the plaintiff's duty to get off the diesel, go forward, and flag the engineer of the diesel when it was safe to make the movement. All this was not done. Because of the omission to follow the prescribed course of conduct, the collision occurred.

In addition, the backward movement was made without any lookout at all. The fireman, Moore, sat in the cab at the front of the backward movement and should have seen the crossover train, but did not. The movement was made recklessly and in entire disregard of the safety of those on the diesel as well as those on the crossover train. It was one of those movements for which there was entirely no excuse and which establishes negligence as a matter of law.

II.

PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

The evidence shows without dispute that plaintiff was a "pilot herder" and not a "pilot." Under the circumstances he had no duty to perform. Furthermore, he was in a position where he could not make an observation and was absolutely at the mercy of Moore, who had got into the engineer's seat in the cab of the diesel, which was at the head of the backward movement. Moore was in the observation seat and not plaintiff. It would have been presumption for the plaintiff to have attempted to supersede Moore or to exercise any of Moore's functions with respect to lookout.

It is elementary that contributory negligence involved the idea of breach of duty—something of fault with the conduct of the employee. *Lynghaug v. Payte*, ... Minn. ..., 76 N.W. 2d 660.

Contributory negligence consists of the doing of some act by the employee, or some omission by the employee, amounting to want of ordinary care for his own safety, which is a direct and proximate cause of his injury.

Chesapeake & O. Ry. Co. v. Richardson (6 Cir.), 116 F.2d 860, cert. den. 313 U.S. 574.

Plaintiff was not guilty of contributory negligence for the plain reason that he was not under any duty which contributed to the accident. He had nothing to do with the forward movement of the engineer which was made in violation of the rule prescribed by Bulletin 49 or the engineer's violation of the rule requiring a yard order authorizing the backward movement and the failure of the fireman Moore to maintain a lookout. Plaintiff could not have prevented any one of these acts. If he had attempted to do so, it is a certainty that the engineer and the fireman would have entirely disregarded it. Furthermore, plaintiff was under no duty to maintain a lookout while the backward movement was being made for the reasons: 1. The plaintiff was put in the position by Moore where he could not make an observation; and 2. Moore had taken over the function of maintaining lookout with the consequence that plaintiff was excluded from any part of the function of maintaining a lookout.

Furthermore, it is to be remembered that under Section 53 contributory negligence on the part of an employee is not a bar to recovery, but diminishes the damages only in proportion to the amount attributable to such contributory negligence.

It must be apparent that any alleged contributory negligence of the plaintiff was very slight indeed as compared to the negligence of the defendant. In any aspect of the case, plaintiff was entitled to recover, even if he was guilty of some contributory negligence, which the plaintiff denies.

III.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE TO THE EFFECT THAT PLAINTIFF HAD A RETIREMENT PENSION

a. The Evidence as to the Retirement Pension Was Entirely Irrelevant and Immaterial and Its Admission Was Prejudicial.

The case was tried upon the theory, in so far as future damages were concerned, plaintiff had sustained injury consisting of "loss of earning power" (R. 274). The evidence as to future earnings was admitted upon the theory that the perspective earnings measured the extent of the loss so occasioned.

Vicksburg & M. R. v. Putnam, 118 U.S. 545, 7 S.Ct. 1, 30 L.Ed. 257.

15 *Am. Jur.*, *Damages*, Sec. 91.

In a personal injury action, evidence that the plaintiff was receiving, at the time of trial, a pension, insurance, annuity, or other income, which became due to him as a result of the accident causing his injuries or otherwise, is entirely immaterial and irrelevant to the issue and it is error for the Court to receive the same in evidence.

Standard Oil Co. v. U. S. (9 Cir.), 153 F.2d 958.

Sinovich v. Erie R. R. Co. (3 Cir.), 230 F.2d 658.

New York, N. H. & H. R. Co. v. Leary (1 Cir.), 204 F.2d 461, 468.

Flener v. Louisville & N. R. Co. (7 Cir.), 198 F.2d 77.

Hetrick v. Reading Co., 39 F. Supp. 22, 25.

Ring v. Mpls. St. Ry. Co., 176 Minn. 377, 223 N.W. 619.

Wise v. C. B. & Q. R. Co. Relief Dept., 133 Minn. 434.

Rodell v. Relief Dept. C. B. & Q. R. Co., 118 Minn. 449.

As held by this Court in *Standard Oil Co. v. U. S.*, supra, where the question is discussed at length and the authorities

are carefully reviewed in an opinion by Circuit Judge Bone (153 F.2d 958):

> "In the United States the prevailing rule seems to be that an injured person may recover for wages lost and medical expenses incurred during his incapacity even though such amounts were supplied by insurance, a contract of employment, or gratuitously."

In *Ring v. Mpls. St. Ry. Co.*, supra, a member of the city fire department was injured in an automobile collision. The trial court excluded evidence that the fireman was entitled to a city pension. The Minnesota Court held that the pension "had no relation to his future earning capacity" and affirmed the decision. The Court said:

> "The refusal of the court to permit defendant to introduce evidence as to plaintiff's right shortly to receive a pension is assigned as error. *Whether plaintiff would or would not, at some time in the future, receive a pension had no relation to his future earning capacity. It had nothing to do with the amount he could be awarded as damages. The proffered evidence was properly rejected.*
>
> "We have examined other rulings of the court on the admission of evidence and find no error therein." (Italics supplied.)

As said in *El Paso El. Ry. Co. v. Murphy* (Tex. Civ. App.), 109 S.W. Rep. 489, where the plaintiff was injured while riding as a passenger on one of the defendant's street cars, in holding that it is entirely immaterial whether or not the injured plaintiff would ever work at the employment in which he was engaged at the time he was injured:

> "A loss or impairment of earning capacity is one of the elements which may be considered by the jury in estimating the damages one has sustained from a personal injury. And in order that it may be considered for that purpose there must be some evidence tending to show what such capacity of the injured party was before its loss or impairment. Where one's earning ca-

pacity is not destroyed, but only impaired, the damages he has sustained can be best shown by what he was capable of earning before he was injured and what he was capable of earning afterwards, and the difference will indicate the damages he has sustained. It must be observed that the matter to be determined is not what he actually earned before his injury, but what his earning capacity actually was, and to what extent that capacity has been impaired. For whatever capacity he had for earning money before the injury, whether he exercised it or not, was his, and he was entitled to it unimpaired by injury wrongfully inflicted by another. One who has impaired the earning capacity of another, when called upon to redress the wrong, cannot be heard to say: 'You had ceased to use your capacity to earn money when I injured you, and would not have exercised it again had you not been injured.' One's earning capacity is property, and in some instances all he has, and he can no more be deprived of it without just compensation than he can of tangible property. It would certainly be no defense to an injury of tangible property that its owner had ceased to use it, and would not, had it not been injured, ever have worked with it any more. It is a matter of no concern to anybody else whether one uses or intends to use his property for the purpose of earning money or not. It is his, and it is the duty of the state to protect him in it, unimpaired from injury by the wrongs of another, or to compel him who has wrongfully impaired the value of its capacity for use to compensate the owner for such impairment. For these reasons the appellee was entitled to recover from the appellant the difference between the value of his earning capacity before and after it was impaired by the injury wrongfully inflicted by the appellant. After he moved from Corpus Christi to El Paso he did not engage in any kind of business, and maybe did not, up to the time of his injury, have any intention of doing business there; but this, as we have seen, did not deprive him of the right to compensation for the impairment of his capacity to earn money, if he had such capacity, caused by the injuries inflicted by appellant's negligence."

These decisions make it crystal clear that the trial court erred in holding, as it instructed the jury at page 274, that such evidence may be considered in connection with the question of whether the plaintiff would have gone on working had he not been injured. That matter is one which has nothing to do with the plaintiff's right to recover for injury to his working capacity. It was prejudicial in the extreme for the trial court to admit the evidence and then instruct the jury it might consider it.

b. Admission of Evidence Relative to Plaintiff's Retirement Pension Was in Contravention of U.S.C.A., Title 45, Sections 228a, 55 and 58.

Phila., B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911.

Chi. G. W. Ry. Co. v. Peeler (8 Cir.), 140 F.2d 865.

Wise v. C. B. & Q. R. Co. Relief Dept., supra.

We do not feel it necessary to labor this point. The rules are well settled and have been stated in the cited cases. In *Chic. G. W. Co. v. Peeler,* supra, the United States Court of Appeals for the 8th Circuit held:

> "The Railroad Retirement Act of 1937, 45 U.S.C.A. §228a et seq., provides that certain described employees 'shall * * * be eligible for annuities after they shall have ceased to render compensated service to any person.'
>
> "Section 55 of the Employers' Liability Act, supra, provides:
>
> "* * * That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to insurance, relief benefit, or indemnity that may have been paid to the injured employee * * * on account of the injury * * * for which said action was brought.

"Section 58. Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

"The question presented is interesting. It has been discussed by the courts in McCarthy v. Palmer, 2 Cir., 113 F.2d 721, 723, and in Hetrick v. Reading Co., D.C. N.J. 39 F.Supp. 22. Neither case is helpful here. In the McCarthy case the question arose on an appeal from a finding of the court as a result of a stipulation, and in the Hetrick case on a motion to strike an affirmative claim for a set-off under the Act. In the present case no claim to a set-off is asserted in the answer. The objection, therefore, that the offered evidence was not material or relevant to any issue was properly sustained. Rules 8(c) and 13 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provide that affirmative defenses and counterclaims must be pleaded, and Rule 12(h) provides that 'A party waives all defenses * * * which he does not present either by motion * * * or * * * in his answer or reply, with certain exceptions not material here. No demonstration is necessary to show that a set-off is a partial or entire defense to an action for damages.'"

In *Wise v. C. B. & Q. R. Co. Relief Dept.*, supra, plaintiff sued on a benefit certificate without filing releases of the railroad from liability. In holding that the filing of such releases was in effect prohibited by Section 55, the Minnesota Court said:

"The statute of 1908 was construed in Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 Sup. Ct. 589, 56 L.ed. 911. This was an action by an interstate employee to recover for personal injuries. He had received benefits from the relief department. The regulations of the department provided that the receipt of benefits should operate as a release of damages for injury. It was held that the provision for a release was within the condemnation of the statute. The court said:

"'But it is urged that the substituted provision—of §5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act." It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. * * * That is the liability which the act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute. "If there could be doubt upon this point, it would be resolved by a consideration of the proviso of §5, which immediately follows the language condemning contracts, rules, regulations or devices, the purpose of which is to exempt the carrier from liability."'

"The statute was construed by this court in Rodell v. Relief Dept. C. B. & Q. R. Co., 118 Minn. 449, 137 N.W. 174. This was an action by the widow of a deceased interstate employee to recover upon a benefit certificate. Under the terms of the membership no death benefit was payable, until releases of the railroad company by all who might legally assert claims for the death were filed with the superintendent. The plaintiff brought

suit on the benefit certificate without filing releases. The defense was that she was not entitled to recover until releases were filed. It was held that in view of the statute quoted releases could not be exacted and the plaintiff could recover the death benefit."

c. Defendant Was Guilty of Misconduct in the Use of the Evidence Relative to Plaintiff's Retirement Pension.

The effect of the closing argument of defendant's counsel with respect to plaintiff's retirement pension was both devastating and prejudicial. His very last remarks to the jury were as pointed out above:

> "I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think in fairness that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you."

The last quotation was the very end of counsel's argument. It was not made to impeach plaintiff, but to discredit entirely his case.

In the case of *Sinovich v. Erie Railway Co.*, supra, the United States Court of Appeals for the Third Circuit, in discussing the harm done there by keeping before the jury the fact of plaintiff's retirement upon pension, said, in granting a new trial (230 Fed. 662):

> "'We think that the whole situation resulted in bringing and keeping before the jury the harmful misstatement that the plaintiff was receiving a pension from the defendant. * * * Plaintiff's attorneys perhaps should have requested the court to repeat what it had said to the effect that the Railroad Retirement Act payments were not to be considered in computing plaintiff's losses but the jury had been so advised once. There is not the slightest indication that those attorneys were speculating on the outcome or doing other than their best for

their client. Under all the circumstances it seems to us that the last moment reiteration by the defense of the barred evidence gravely and unwarrantably impaired the worth of plaintiff's claim to the jury. He is entitled to a new trial.'

"What is said in this quotation applies here. The claim of impeachment is too thin a disguise to conceal that defendant's real purpose was to discredit plaintiff's entire claim by irrelevant and immaterial evidence. The defendant's parting words to the jury were just that. No court should tolerate such a procedure to say nothing of the breach of faith and imposition upon the court, which counsel's conduct and argument involves. After all, plaintiff is entitled to a fair and impartial trial. This, defendant's counsel deprived him of."

IV.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO REVERSE THE EVIDENCE AS TO PLAINTIFF'S RETIREMENT PENSION FOR PURPOSES OF IMPEACHING PLAINTIFF AND THEN TO PERMIT ITS USE FOR OTHER PURPOSES

This rule is supported by a unanimity of authority wherever it has been considered.

Brandt v. Penn R. Co. (7 Cir.), 231 F.2d 848.

In 88 *C.J.S., Trial*, Sec. 87, p. 195, the text reads:

"Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose. It is manifest that any other rule would result in surprise and injustice. Where a party offers evidence for a limited purpose, he is not bound by the evidence for another purpose. Where plaintiff offers evidence for a restricted purpose, it has been held both that defendant may and that he may not use it for another purpose without a second offer for such purpose."

Numerous cases are cited in notes 11 and 18 holding that, where evidence is admitted for a limited purpose, failure of the trial court to so limit it constitutes error.

Kucaba v. Kucaba, Neb. ___, 18 N.W. 645, 648.

V.

APPEALS TO LOCAL PREJUDICE AND PASSION BY DEFENDANT IN ITS CLOSING ARGUMENT CONSTITUTED MISCONDUCT ENTITLING PLAINTIFF TO A NEW TRIAL

The reference in the closing argument of defendant's counsel to plaintiff's attorney not as an "attorney," but as "lawyers" from Minneapolis had nothing to do with whether plaintiff was entitled to recover. This allusion to plaintiff's counsel was not an isolated act of misconduct, but, rather, was part of a plan consisting of numerous acts of misconduct, such as reference to plaintiff's retirement pension, his trial and discipline by defendant (for this there was no basis at all in the record), and the misuse of the evidence relative to the pension, all of which has a cumulative effect of causing plaintiff and his case to be prejudiced. Reference to the nonresidence of a party is prejudicial error.

London Guarantee & Acc. Co. v. Woelfle (8 Cir.), 83 F. 2d 325.

Brotherhood of Painters, Etc., v. Trimm, 207 Ala. 587, 93 So. 533.

State v. Bernstein, 148 Minn. 301, 181 N.W. 947.

Hall v. Rice, 117 Neb. 813, 223 N.W. 4, 78 A.L.R. 1421.

88 *C.J.S., Trial,* Sec. 188, p. 373.

53 *Am. Jur., Trial,* Sec. 499, p. 403, note 8.

Anno.: 78 *A.L.R.* 1456.

The remarks of defendant's counsel had no tendency to explain the issues to be decided by the jury. They could not make any contribution to the attainment of justice. The sole purpose or effect of such appeals is to defeat justice. The remarks of counsel here could have no different effect under the circumstances. A new trial should be granted in order that this case may be tried right. As said in *State v. Bernstein,* supra, quoting from *Masterson v. Chicago & N. W. Ry. Co.,* 102 Wis. 571, 78 N.W. 757 (148 Minn. 308):

> "A case that cannot fairly be won upon the evidence by the use of legal and lawyer-like methods presumably does not deserve to be won at all."

CONCLUSION

This is a case where defendant's negligence appears as a matter of law and where it appears that plaintiff was not guilty of contributory negligence as a matter of law. If the Court should hold, contrary to plaintiff's contention, that he was not guilty of contributory negligence as a matter of law, it should hold that his negligence was very slight as compared to the negligence of defendant, and that, consequently, plaintiff is entitled to a verdict making slight deduction for his own negligence.

The evidence relative to plaintiff's retirement pension and the use made thereof by the defendant utterly destroyed the strong case of negligence which the plaintiff had made. The evidence as to the retirement pension coupled with defendant's appeal to local prejudice were devastating and utterly deprived plaintiff of the fair and impartial trial that every litigant is entitled to.

In the interest of justice, there should be a reversal granting to plaintiff a new trial in which the element of prejudice referred to should be eliminated.

Respectfully submitted,

EUGENE A. RERAT
Attorney for Appellant
610 Baker Building
Minneapolis, Minnesota

Of Counsel:
HARRY H. PETERSON
505 Minnesota Federal Bldg.
Minneapolis, Minnesota
OWEN A. JOHNSON
1201 Dexter Horton Bldg.
Seattle, Washington